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SC97993

IN THE SUPREME COURT OF MISSOURI

VINCENT HEGGER (DECEASED), ET AL.,

Plaintiff-Appellant,

vs.

VALLEY FARM DAIRY COMPANY, AMERISURE INSURANCE COMPANY, and THE TRAVELERS INDEMNITY COMPANY,

Defendants-Respondents.

Transferred from the Missouri Court of Appeals, Eastern District, Division Four
Hon. Gary M. Gaertner, Jr. and Hon. Colleen Dolan; Hon. Kurt S. Odenwald (Dissenting)
Court of Appeals No. ED106278

On Appeal from the Missouri Labor and Industrial Relations Commission No. 14-103079

BRIEF OF *AMICI CURIAE* AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND MISSOURI INSURANCE COALITION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA was recently formed through a merger of two longstanding trade associations – the Property Casualty Insurers Association of America (PCI) and the American Insurance Association (AIA). APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe. On issues of importance to that marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before state and federal courts, including this Court. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interest is in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

The Missouri Insurance Coalition ("MIC") is a not-for-profit state trade association providing governmental and public relations representation for insurance companies and affiliated entities operating in the State of Missouri. Its members write approximately 90% of the property and casualty insurance policies in this State. MIC represents the insurance industry on insurance-related matters before the legislative, executive and judicial branches of government in Missouri.

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Many members of APCIA and MIC have issued workers' compensation policies similar to those at issue in this case, both in Missouri and nationwide. These organizations are therefore vitally interested in this appeal, which involves an important question about the scope of coverage required under those policies. The answer depends on this Court's interpretation of whether recent Missouri legislation, Section 287.200.4 RSMo. (rev. Jan. 1, 2014) (the "2014 Statute"), providing that an employer may elect enhanced workers' compensation benefits for mesothelioma victims in exchange for protection from civil liability, should be applied retrospectively.

Public policy considerations, in addition to well-settled Missouri constitutional, statutory and common law construction principles, require enforcement of the 2014 Statute and the Respondents' insurance policies as written. Specifically, the Labor and Industrial Relations Commission correctly found that the 2014 Statute's enhanced benefit cannot be imposed on insurers unless and until the insured employer makes an election to do so by purchasing insurance that expressly covers that risk. *A fortiori,* such an election could not have been made prior to the 2014 Statute's enactment. An insurance policy is first and foremost a contract representing an agreement between the insurer and the policyholder. The insurer agrees to protect the policyholder against certain specified risks in return for payment of a premium. The insurer must know exactly what those risks are so that it may decide whether to assume those risks and, if so, determine an appropriate premium.

The attempted imposition by the Court of Appeals on past contractual bargains of a legislatively-created benefit scheme that by its express terms is forward-looking not

only frustrates the intentions of the Respondent Insurers, but threatens the integrity of the insurance underwriting system, which depends on predictable enforcement of contract provisions. The possibility that courts may contort the meaning of legislation to impose liability on an insurer for which it has not collected premiums significantly increases the risk insurers must bear when providing coverage, in a manner that could not have been contemplated at the time coverage was bound. In the context of workers' compensation claims like those at issue here, failing to enforce the plain, unambiguous language of the 2014 Statute could expose insurers to massive unintended liabilities. Moreover, there is no need to distort the statutory language in order to ensure mesothelioma victims and their families have access to compensation. Even without the 2014 Statute's enhanced benefit, mesothelioma victims may recover traditional workers' compensation benefits, pursue civil tort actions against solvent defendants other than the employer, and pursue claims against dozens of asbestos bankruptcy trusts.

APCIA and MIC, as well as their predecessor organizations, have appeared as *amicus curiae* in numerous complex insurance cases throughout the country, including before this Court.[1] Due to their members' extensive experience with workers' compensation coverage and legislation affecting workers' compensation benefits, APCIA and MIC have a unique perspective on the issues presented in this appeal. As such,

[1] For example, AIA appeared as *amicus curiae* in *The Doe Run Resources Corp. v. American Guarantee & Liability Ins.,* 531 S.W.3d 508 (Mo. banc 2017) and in *Watts v. Lester E. Cox Medical Centers,* 376 S.W.3d 633 (Mo. banc 2012). MIC filed an *amicus* brief in several insurance coverage cases including *Karscig v. McConville,* 303 S.W.3d 499 (Mo. banc 2010) and in *Ritchie v. Allied Prop. & Cas. Ins. Co.,* 307 S.W.3d 132 (Mo. banc 2009).

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APCIA and MIC respectfully submit that their participation may assist this Court in deciding this case.

JURISDICTIONAL STATEMENT/STATEMENT OF FACTS

APCIA and MIC adopt and incorporate herein by reference the jurisdictional statement and statement of facts set forth in Respondents' brief.

CONSENT OF THE PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), APCIA and MIC certify that Respondents have consented and Appellant has not consented to the filing of this brief.

ARGUMENT

I. THE MISSOURI LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY FOUND THAT THE ENHANCED MESOTHELIOMA BENEFITS CREATED BY RSMO. SECTION 287.200.4(3) ARE NOT AVAILABLE WHEN THE EMPLOYER DOES NOT TAKE THE STEPS REQUIRED BY THE STATUTE TO ELECT THOSE ENHANCED BENEFITS, AND THEREFORE ITS DECISION SHOULD BE AFFIRMED.

The 2014 Statute, Section 287.200.4 RSMo., was amended as of January 1, 2014 to add the following language relevant to this appeal:

> **287.200. Permanent total disability, amount to be paid — suspension of payments, when — toxic exposure, treatment of claims. —**
>
> . . . .
>
> 4. For all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total disability or death, benefits in this chapter shall be provided as follows:

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(1) Notwithstanding any provision of law to the contrary, such amount as due to the employee during said employee's life as provided for under this chapter for an award of permanent total disability and death, except such amount shall only be paid when benefits under subdivisions* (2) and (3) of this subsection have been exhausted;

(2) For occupational diseases due to toxic exposure, but not including mesothelioma, an amount equal to two hundred percent of the state's average weekly wage as of the date of diagnosis for one hundred weeks paid by the employer; and

(3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:

> **(a) For employers that have elected to accept mesothelioma liability under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer or group of employers such employer is a member of. Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool. A group of employers may enter into an agreement to pool their liabilities under this subsection. If such group is joined, individual members shall not be required to qualify as individual self-insurers. Such group shall comply with section 287.223. In order for an employer to make such an election, the employer shall provide the department with notice of such an election in a manner established by the department. The provisions of this paragraph shall expire on December 31, 2038; or
>
> **(b) For employers who reject mesothelioma under this subsection, then the exclusive remedy provisions under section 287.120 shall not apply to such liability. The provisions of this paragraph shall expire on December 31, 2038; . . . .

Section 287.200.4(1)-(3) RSMo.

The 2014 Statute was passed following a period of several years in which Missouri employers were subject to both workers' compensation and tort liability for employee occupational disease. *See, e.g., Amesquita v. Gilster-Mary Lee Corp.,* 408 S.W.3d 293, 299-302 (Mo. App. E.D. 2013) (applying strict construction to hold that,

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notwithstanding apparent legislative intent, 2005 Amendment to Workers' Compensation Law did not provide exclusive remedy for occupational disease claims). The plain wording of the 2014 Statute provides enhanced benefits for mesothelioma while restoring the statute's exclusive remedy provision when such enhanced benefits are provided. *See Missouri Alliance for Retired Americans v. Dep't of Labor and Indus. Relations,* 277 S.W.3d 670, 683-84 (Mo. banc 2009) ("The workers' compensation law long has been described as a 'bargain' in which the employer forfeits common law defenses and assumes automatic liability. In return, the employee forfeits the right to a potentially higher common law judgment in return for assured compensation"); *Larson's Workers' Compensation Law* § 100.01 (1) (2015) (workers' compensation act's exclusive remedy provisions are "part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in a balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts").

The 2014 Statute as drafted clearly provides that the enhanced workers' compensation benefit for mesothelioma and concomitant protection from tort liability is an option available only on a going-forward basis to employers that make an informed decision to elect to participate in such a tradeoff. *See* 2014 Statute ("Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool"). There is nothing in the plain language of the 2014 Statute that suggests the enhanced benefit will be involuntarily imposed on long-expired insurance policies like those at issue in this case. As the Labor and Industrial Relations Commissions

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("Commission") explained in the Award that is the subject of this appeal, "The question at the crux of this matter is whether the insurer of a long-defunct employer can be held liable for the new 'enhanced benefits' set forth in §287.200(4) . . . ." A11. As the Commission continued:

> Prior to the 2014 amendments . . . there was no "enhanced benefit" for the toxic occupational disease of mesothelioma. As of January 1, 2014, an entirely new benefit was created . . . . The statute also allowed the employer to elect to either have this new mesothelioma coverage or opt out of the coverage and subject itself to regular civil liability should one of its employees be stricken with mesothelioma.

Id. (quoting Award, *Robert Casey,* Injury No. 14-102671).

This appeal involves questions of statutory construction, as to which clear statutory and common law principles apply. Since 2005, the Workers' Compensation Law itself has mandated strict construction of its provisions. RSMo. § 287.800.1 ("any reviewing courts shall construe the provisions of this chapter strictly"). "'Strict construction of a statute presumes nothing that is not expressed.'" *Young v. Boone Elec. Coop.,* 462 S.W.3d 783, 792 (Mo. App. W.D. 2015) (quoting R*obinson v. Hooker,* 323 S.W.3d 418, 423 (Mo. App. W.D. 2010) (citation omitted)).

This Court has likewise made clear that the plain language of a statute must be enforced as written. *See In re Boland,* 155 S.W.3d 65, 67 (Mo. banc 2005) (the "primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning"). When the words of the statute are clear, "'there is nothing to construe beyond applying the plain meaning of the law.'" *State ex rel. Valentine v.*

Orr, 366 S.W.3d 534, 540 (Mo. banc 2012) (citation omitted); *see also City of Charleston ex rel. Brady v. McCutcheon,* 227 S.W.2d 736, 739 (Mo. banc 1950) ("We cannot, however, as appellants request, contort the plain words of the statute or re-write it . . . ."). To rewrite a statute "would be but judicial usurpation of the legislative function. That we cannot do." *City of Charleston ex rel. Brady,* 227 S.W.2d at 739. Here, the plain words of the 2014 Statute refer to employers "that elect to accept mesothelioma liability under this subsection." Those words contemplate an affirmative decision and future action. Appellant's construction, as adopted by the majority opinion in the Court of Appeals, reads the word "elect" right out of the Statute. Appellant acknowledges that his argument requires the Court to construe "elect to accept" as "in effect nothing but shorthand for the list of specific criteria that define it." Appellant's Brief at 36. He then describes how the statute should be "functionally" read. *Id.* These are not arguments based on the plain language of the statute, but rationalizations designed to achieve a desired goal.

Moreover, the reference in the 2014 Statute to accepting mesothelioma liability "under this subsection" is important. Since this portion of the 2014 Statute did not exist before the statute's passage, there was no liability to accept until the subsection's enactment on January 1, 2014. The 2014 Statute goes on to state that employers that elect to accept liability "may do so by . . . insuring . . . qualifying . . . or by becoming . . . ." Again, all of these verbs are stated in the present or future tense and require action going forward, not passive imposition of a new class of benefits on pre-existing policies and contractual relationships.

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In this case, the decedent employee, Vincent Hegger, was employed by Respondent Valley Farm Dairy ("Valley Farm") from 1968 until sometime in 1984. A08. He was first diagnosed with mesothelioma on March 19, 2014, filed a claim for enhanced workers' compensation benefits thereafter, and passed away from his disease on June 7, 2015. *Id.* Valley Farm has been out of business since 1998. *Id.* However, Valley Farm had workers' compensation insurance through Amerisure Insurance Company from October 17, 1983 through October 17, 1984, and through The Travelers Indemnity Company from October 17, 1984 through October 17, 1985. *Id.* Appellant argues that these thirty-plus year old policies satisfy the 2014 Statute's requirement that an employer may elect the enhanced mesothelioma benefit by "insuring its liability."

The Commission properly found in applying the statute to Valley Farm that the "plain meaning of the word 'elect' is to make a decision to do something, and 'accept' is to take something that is offered." A12. **"It defies logic to suggest an entity that ceased to exist in the late 1990s could have made a decision to take or accept the protection of a statute that was not effective until 2014."** *Id.* (emphasis added). The Commission rejected Appellant's "clever" argument that Valley Farm had elected the enhanced benefits under the 2014 Statute by purchasing insurance to cover occupational diseases in 1984. A13; *see also Hegger v. Valley Farm Dairy Co.,* 2019 WL 2181663, *12 (Mo. App. E.D. May 21, 2019) (Dissent (Odenwald, J.)), *transferred to Mo. Supreme Ct.* September 3, 2019 ("Valley Farm's past conduct did not fulfill the statutory mandate of a present action for employers to elect to accept the enhanced liability of Section 287.200.4"). The Commission first found that the enhanced benefits were not simply an

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increase in the amount of benefits for mesothelioma, but rather benefits of a new type or class, because they are stated in the Statute to be in addition to existing benefits. A13; *see also Hegger*, 2019 WL 2181663, at *9 (Dissent) ("Significantly, the exclusivity protections of the Act attach to the enhanced benefits provided for mesothelioma under Section 287.200.4 only by the employer's election to accept liability for such benefits under the 2014 Amendment"). Under Appellant's construction, if an employer does nothing but leave past insurance policies in place, it could claim exclusivity without having to purchase coverage that includes the enhanced benefit.

The Commission correctly noted that a court should never construe a statute in a manner that would render the legislative changes a useless act. A13. Insurance of occupational diseases under workers' compensation liability has been a requirement in Missouri since 1974. Therefore, under Appellant's strained interpretation, the mere existence of any pre-existing policy would have provided coverage of the enhanced mesothelioma liability and exclusivity protection. "The words 'elect to accept' would be moot." *Id.* As the Commission added, "[i]f the legislature wanted any existing policy covering occupational diseases to cover mesothelioma liability, it would have included mesothelioma with the other occupational diseases due to toxic exposure, where no election to accept is required." *Id; see also Hegger*, 2019 WL 2181663, at *14 (Dissent) ("Although the legislature was not precluded from enacting a statute automatically imposing liability for the enhanced mesothelioma benefits on all employers who had insured against liability for mesothelioma benefits in the past, it did not do so here").

The context of the passage of the 2014 Statute is also significant. Two years prior to the 2013 legislative session, the Court of Appeals applied a strict constructionist approach to hold that the exclusive remedy provisions of the Workers' Compensations Law, as amended in 2005, did not apply to an occupational disease like mesothelioma. *See State ex rel. KCP&L Greater Missouri Operations Co. v. Cook,* 353 S.W.3d 14, 18-19 (Mo. App. W.D. 2011). The *KCP&L* Court reached this conclusion notwithstanding the inconsistency of this outcome with the apparent legislative intent. The 2014 Statute appears to have been passed in reaction to that decision and was intended to protect employers from the risk of greater civil liability by providing a new enhanced benefit in exchange for exclusivity – again, at the employer's election.[2] *See* A14.

The Commission's interpretation of the 2014 Statute is also completely consistent with this Court's reasoning in *Accident Fund Ins. Co. v. Casey,* 550 S.W.3d 76 (Mo. banc 2018). In *Casey*, the employee was exposed to asbestos while working for his employer in the 1980's. He was diagnosed with mesothelioma in the fall of 2014 and filed a claim

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[2] Official actions taken since the passage of the 2014 Statute confirm this interpretation. In 2017 the Division of Workers' Compensation promulgated Forms WC-304-I and WC-304-G, pursuant to which employers provide notice to the Division of their election to accept or reject enhanced mesothelioma liability under the 2014 Statute. Form WC-304-I includes alternative checkboxes for the employer to designate whether it will: (1) insure the liability with a third-party insurer; (2) self-insure; or (3) join a group insurance pool. *See* https://labor.mo.gov/sites/labor/files/pubs_forms/WC-304-I.pdf.

The Missouri Department of Insurance also approved after the 2014 Statute was enacted new Missouri-specific endorsements to workers' compensation policies promulgated by the National Council on Compensation Insurance, the State of Missouri's approved advisory organization, that document whether the enhanced benefits will be covered or excluded. *See* https://insurance.mo.gov/consumers/wc/documents/04-MO-2013.pdf.

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for workers' compensation benefits with the employer in February 2015. At the time the claim was filed, the employer was covered under an insurance policy that expressly insured the enhanced mesothelioma benefits provided for by the 2014 Statute. This Court concluded that the employer had elected to accept the enhanced benefits under the 2014 Statute by virtue of placing coverage for that risk after the statute's enactment, and therefore the insurer was liable for the enhanced benefits under the policy:

> Through this policy, Employer accepted, and Insurer provided, liability insurance for the enhanced benefits—the only benefits Mr. Casey sought (and Ms. Murphy now seeks). The relevant inquiry in this matter is not under whose employment Mr. Casey was last exposed, but whether the terms of Employer's policy provide coverage. The answer is clear. Insurer provided coverage to Employer by expressly adopting section 287.200.4 into its endorsement.

Casey, 550 S.W.3d at 81. This Court relied on the affirmative act of the employer obtaining an insurance policy that expressly conformed to the 2014 Statute. For that reason, the Court did not find the 2014 Statute to be a retrospective law. "Because Insurer affirmatively assented to providing these enhanced benefits, the new law does not impair any vested right Employer or Insurer once held." *Id.* at 82.

Here, neither Amerisure nor Travelers did or could affirmatively assent to providing the enhanced statutory benefits to Valley Farm employees, given that their policies expired thirty years before the Statute was amended as of January 1, 2014. In contrast, under the facts of *Casey,* "[i]t was not until after the amendments went into effect that Insurer and Employer contracted for coverage, and it was only after they entered into the contract that Mr. Casey filed his claim seeking workers' compensation benefits *under the new statutory provisions.*" *Id.* (emphasis in original). The facts in

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Casey were the complete obverse of those in this case and demonstrate why the 2014 Statute, by its plain language, was applicable to the mesothelioma claim in that case but cannot be applied to impose enhanced benefits on the Amerisure and Travelers policies issued to Valley Farm in 1984.

II. THE MISSOURI CONSTITUTION PROHIBITS RETROSPECTIVE APPLICATION OF STATUTES THAT CHANGE PREEXISTING CONTRACTUAL RELATIONSHIPS, AND MAINTAINING THIS CERTAINTY IS OF PARTICULAR IMPORTANCE IN THE INSURANCE INDUSTRY WHERE POLICY PREMIUMS ARE CALCULATED BASED ON CONTEMPORANEOUS ASSESSMENT OF RISK.

This Court should reaffirm on this appeal the important principle of Missouri law that contracts, including contracts of insurance, must be enforced in accordance with their bargained-for terms in order to effectuate the parties' intent. *See, e.g., Allen v. Cont'l Western Ins. Co.,* 436 S.W.3d 548, 554 (Mo. banc 2014); *see also Peters v. Employers Mut. Casualty Co.,* 853 S.W.2d 300, 301-303 (Mo. banc 1993). This is not only a principle of common law but is enshrined in the Missouri Constitution. *See* Mo. Const. Art. 1, § 13 (no law impairing the obligation of contracts or retrospective in its operation can be enacted). As this Court has emphasized:

> [T]he underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto.

State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409, 411 (Mo. banc 1974); *see also Desai v. Seneca Specialty Ins. Co.,* ---S.W.3d---, 2019 WL 2588572, at *4

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(Mo. banc June 25, 2019) ("Here, the contract was entered into prior to the amended statute's enactment, so the amended statute does not apply to this case").

The Court of Appeals' majority opinion ignored this principle in reaching the conclusion that the 2014 Statute's election provision could be applied retrospectively to thirty year-old insurance policies issued under an entirely different statutory and common law framework. To adopt the Court of Appeals' rationale would be to undermine the ability of insurers and other businesses to structure their affairs with confidence that their contracts will be enforced as written. As noted in Section I above, the Commission explained in the Award that is the subject of this appeal that "'[a]s of January 1, 2014, an entirely new benefit was created.'" A11 (citations omitted).

The monetary cost of the enhanced mesothelioma benefit is considerable. The statute requires payment of 300% of the state's average weekly wage for 212 weeks. Under the current average weekly wage of $981.65,[3] this comes to $624,329.40 for a single claim. This is a significant new cost to impose on a long-expired workers' compensation policy that could not have anticipated this change in character of asbestos injury benefits

An insurance contract expresses an insurer's agreement to accept, in return for a premium, a defined risk. When insurers cannot rely on clear statutory language to determine rational premiums, the adverse consequences fall on the insurance-buying

[3] https://labor.mo.gov/sites/labor/files/2019SAWWM.pdf.

public—and in the cases of commercial policyholders, especially on small and medium-sized businesses that cannot afford to self-insure. Courts have commented that judicial expansion of liability may force insurers to raise premiums paid by all policyholders. *See Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) (judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities"). Giving straightforward and consistent effect to the policy language as written and not imposing retrospective statutory obligations on pre-existing contracts assures the stability of the underwriting process.

Here, the 2014 Statute can be applied according to its express and unambiguous terms in a way that does not run afoul of the above principles. The Missouri Labor and Industrial Commission did so, as did Judge Odenwald's dissent. To disregard this interpretation in favor of the results-oriented construction applied by the majority of the Court of Appeals panel "in a compassionate effort to provide increased workers' compensation benefits to the family of a deceased employee," *Hegger*, 2019 WL 2181663, at *7 (Dissent), would undermine not only established Missouri precedent but the insurance system as a whole. Judicial redrafting of statutory language to impose a substantive contractual amendment on decades-old policies will ultimately result in excessive uncertainty over risk assessment in underwriting. Forcing coverage of enhanced mesothelioma benefits into policies that were not written to cover them undermines an insurer's underwriting and pricing of insurance. For these reasons, and for the reasons articulated in Respondents' Substitute Brief, APCIA and MIC respectfully

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request that this Court affirm the determination of the Commission and find that the 2014 Statute does not require the Insurer Respondents to provide enhanced benefits under the 2014 Statute.

III. AFFIRMING THE COMMISSION'S PROPER INTERPRETATION OF SECTION 287.200.4(3) WILL NOT LEAVE A SIGNIFICANT NUMBER OF MESOTHELIOMA VICTIMS WITHOUT A REMEDY, GIVEN OTHER AVAILABLE RESOURCES FOR COMPENSATING VICTIMS OF ASBESTOS-RELATED DISEASE.

The concern expressed by Appellant and the Court of Appeals majority that employees of defunct corporations like Valley Farm will be left without a viable remedy for occupational mesothelioma is misplaced. Judge Odenwald's Dissent acknowledged this concern but emphasized that such a public policy argument, "however well intentioned, does not overcome the plain language and clear dictate of Section 287.200.4." *Hegger*, 2019 WL 2181663, at *16 (Dissent). "[I]t is not within the Court's province to 'question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination.'" *Turner v. School District of Clayton,* 318 S.W.3d 660, 668 (Mo. banc 2010) (citations omitted). "The Court must enforce the law as it is written." *Id.* The 2014 Statute was a compromise solution that would afford enhanced benefits if employers elected to do so in exchange for protection from civil liability. It was inarguably within the legislature's prerogative to adopt such a compromise while being well aware that defunct employers would not be able to make an election (and their employees would not be eligible to receive enhanced

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benefits), due to the long-tail nature of asbestos diseases that inevitably results in some employers going out of business over the course of several decades.

But even under the 2014 Statute as properly limited, Mr. Hegger's heirs would still be entitled to recover the traditional occupational disease death benefit, as well as have the ability to bring a lawsuit. *See Hegger*, 2019 WL 2181663, at *16 (Dissent) ("The 2014 Amendment to the Act neither denies an employee suffering from mesothelioma traditional relief under the Act, nor forecloses that employee's right to pursue a civil claim for damages against the employer"). Therefore, Mr. Hegger's heirs are not left without a remedy. Moreover, while Valley Farm is no longer in existence, and thus it is unknown what, if any, assets would be available to satisfy a civil judgment, there are substantial assets available both within and outside the tort system to persons exposed to asbestos from the former major asbestos producers.

For example, Mr. Hegger's heirs are not precluded from seeking tort recovery against solvent entities based on various theories of liability, which they have done.[4] By way of background, in earlier years, the asbestos litigation typically pitted an asbestos worker "against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location." James S. Kakalik *et al.,* Costs of

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[4] *See Steven Hegger, as the Surviving Son of Vincent Hegger, Deceased, v. Union Carbide Corporation et al.*, Circuit Court for the City of St. Louis, Missouri (22nd Judicial Circuit) Cause No. 1422-CC00984. There were over 60 named defendants. The case was dismissed in 2016 after the court approved a confidential settlement between plaintiff and 18 of the defendants.

Asbestos Litigation 3 (Rand Corp. 1983). Much of this work involved insulation containing long, rigid amphibole fibers, rather than the more common, and less toxic, chrysotile form of fiber. *See, e.g.*, *In re Asbestos Litigation,* 911 A.2d 1176, 1181 (Del. Super. May 9, 2006), *cert. denied*, 2006 WL 1579782 (Del. Super. June 7, 2006), *appeal refused*, 906 A.2d 806 (Del. Super. June 13, 2006).

By the late 1990s, the asbestos litigation had reached such proportions that the Supreme Court of the United States described it as an "elephantine mass" *see Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 821 (1999), and a "crisis." *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 597 (1997). Mass filings led virtually all of the primary historical defendants to file bankruptcy.

After the most culpable asbestos defendants exited the tort system through bankruptcy, the litigation "spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy, Wall St. J.,* Apr. 6, 2001. The focus of plaintiff attorneys shifted "away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products." Marc C. Scarcella *et al., The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27 *Mealey's Litig. Rep.: Asbestos* 1 (Nov. 7, 2012). The Towers Watson consulting firm has identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation." Jenni Biggs *et al., A Synthesis of Asbestos Disclosures from Form 10-Ks –*

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Updated (Towers Watson Insights, April 2010) at 1 (https://docplayer.net/19087508-A-synthesis-of-asbestos-disclosures.html). As a result, companies that used to be peripheral defendants are "now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007).

In addition to these solvent defendants, many commentators have noted that there are billions of dollars being held in asbestos trusts to "answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley, *et al., The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008,* 23 Widener L.J. 675 (2014). As of 2011, there were over sixty trusts in operation with a combined total of over $30 billion in assets. [5] *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011). These trusts operate independent of the civil tort system. *See* Lloyd Dixon, *et al., Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010).

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[5] *See, e.g.,* Manville Trust, 2002 Trust Distribution Process (TDP) § B(C)(11) (Revised Jan. 2012) at 12, 40, which includes a scheduled value of $350,000 and a maximum value of $750,000 for mesothelioma claims.

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It has been noted that it is "much easier to collect against a bankruptcy trust than a solvent defendant." Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas,* 40 The Advoc. (Tex.) 80, 80 (2007). "[B]ankruptcy trusts have emerged to give asbestos firms an almost automatic guarantee of settlements for their clients." *Id.* at 82; *see also* Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud,* Wall St. J. Mar. 11, 2013, at 4 ("Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys."). If a claimant meets the trust's criteria, the claimant will receive a payment. *See* U.S. GAO, *supra,* at 21. "Thus, it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court." S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation,* 23 Widener L.J. 299, 317 (2013).

Mesothelioma victims typically qualify for payment from multiple trusts, since each trust operates independently and many workers were exposed to the asbestos-containing products of a variety of former defendants. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul.L.Rev. 1071, 1078-79 (2014). For example, in a bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff's total recovery was estimated to be $1-

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$1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Techs., LLC,* 504 B.R. 71, 96 (W.D. N.C. Bankr. 2014). Missouri courts have acknowledged the availability of asbestos trusts and have been protective of plaintiffs' rights to seek recovery from those trusts without prejudice to pursuing compensation in a direct action against the employer. *See, e.g., Wagner v. Bondex International, Inc.,* 368 S.W.3d 340, 359-361 (Mo. App. W.D. 2012) (holding trial court could not delay entry of judgment and force plaintiffs to seek settlement agreements with asbestos bankruptcy trusts in order to offset those settlement amounts from the judgment); *Poage v. Crane Co.,* 523 S.W.3d 496, 528-30 (Mo. App. E.D. 2017), *cert. denied*, 138 S.Ct. 1326 (2018) (holding trial court did not err in failing to reduce judgment by potential future value of unsettled placeholder claims filed by plaintiffs against 30 asbestos trusts); *Urbach v. Okonite Company,* 514 S.W.3d 653, 666-667 (Mo. App. E.D. 2017) (Wisconsin statute requiring mesothelioma victim's widow to assign to defendant all future rights against asbestos trusts before collecting on $4.1 million judgment held procedural and therefore not applicable to litigation in Missouri).

While there is insufficient evidence in the record to determine which solvent asbestos defendants or asbestos trusts may have been, or may still be, a source of recovery for Mr. Hegger's heirs, the fact of their existence, in combination with traditional workers' compensation benefits, provides some assurance that a mesothelioma victim whose employer does not (or cannot) elect an enhanced benefit under the 2014 Statute will not go uncompensated.

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CONCLUSION

For the foregoing reasons, *amici curiae* American Property Casualty Insurance Association and Missouri Insurance Coalition respectfully request that the award of the Missouri Labor and Industrial Relations Commission be upheld.

Dated: October 21, 2019

Respectfully submitted,

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RULE 84.06 CERTIFICATION

The undersigned hereby certifies as counsel of record for *Amici Curiae* that: (1) I signed the original Brief; (2) the brief complies with the limitations contained in Rule 84.06(b); and (3) the word count for this brief is 6,652 words per Microsoft Word for Windows.

/s/ Lisa A. Pake

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CERTIFICATE OF SERVICE

It is hereby certified that on this 21st day of October, 2019, a copy of the foregoing **Brief of Amici Curiae American Property Casualty Insurance Association and Missouri Insurance Coalition** was filed electronically with the Clerk of the Court to be served by operation of the Court's Electronic Filing System on all counsel of record

/s/ Lisa A. Pake

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